

SHIRLI FABBRI WEISS (Bar No. 079225)  
shirli.weiss@dlapiper.com  
GERARD A. TRIPPITELLI (Bar No. 235788)  
jerry.trippitelli@dlapiper.com  
JULIE L. SCHWARTZ (Bar No. 216392)  
julie.schwartz@dlapiper.com  
ALYSSON RUSSELL SNOW (Bar No. 225185)  
alysson.snow@dlapiper.com  
**DLA PIPER US LLP**  
401 B Street, Suite 1700  
San Diego, CA 92101-4297  
Tel: 619.699.3650  
Fax: 619.699.2701

Attorneys for Defendant  
ALEXANDER YAROSHINSKY

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

IN RE CONNETICS CORPORATION  
SECURITIES LITIGATION

CASE NO. 3:07-cv-02940-SI

CLASS ACTION

This Document Relates To:

ALL ACTIONS.

**ALEXANDER YAROSHINSKY'S REPLY  
MEMORANDUM IN SUPPORT OF  
MOTION TO STRIKE PORTIONS OF  
PLAINTIFF'S SECOND AMENDED  
CONSOLIDATED CLASS ACTION  
COMPLAINT**

Date: August 15, 2008  
Courtroom: 10  
Time: 9:00 a.m.  
Judge: Honorable Susan Illston

**I. INTRODUCTION AND SUMMARY OF ARGUMENT.**

Lead Plaintiff's Second Amended Consolidated Class Action Complaint (the "SAC") and their Opposition to Defendant Alexander Yaroshinsky's ("Dr. Yaroshinsky") Motion to Strike certain paragraphs of Lead Plaintiff's SAC do nothing to cure the fatal deficiencies identified by this Court in its January 29, 2008 Order that struck virtually every allegation relating to Dr. Yaroshinsky. Plaintiff claims that it conducted its own reasonable investigation into the allegations in the SAC and that it therefore satisfied the requirements of Rule 11(b) of the Federal Rules of Civil Procedure. But Plaintiff has done nothing different with this round of pleadings than it did with its first round, which the Court found legally insufficient. All of Plaintiff's arguments in its Opposition lead to the same conclusion: the allegations in the SAC were "cut and pasted" from the complaint filed by the Securities and Exchange Commission ("SEC") in the SEC's lawsuit against Dr. Yaroshinsky, *SEC v. Yaroshinsky*, Case No. 06 CV2401 (RCC) (S.D.N.Y.) (the "SEC Complaint"). While Plaintiff makes the conclusory assertion that it conducted an investigation to support its Rule 11 obligations, it is clear that Plaintiff intends to rely only on the SEC's investigation (and thus the SEC's Complaint), and that Plaintiff can point to nothing that corroborates the allegations in the SAC that Plaintiff lifted from the SEC Complaint concerning Dr. Yaroshinsky.

Thus, because Plaintiff failed to fulfill its mandatory, non-delegable duties under Rule 11(b) of conducting a reasonable investigation into the facts alleged in the SAC concerning Dr. Yaroshinsky, the Court should strike the following paragraphs in the SAC: 16, 40-41, 45-48, 52, 54-55, 107-108, 133-144, 146, 310-311, 368-369 and 389-391.<sup>1</sup>

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<sup>1</sup> Plaintiff argues that Dr. Yaroshinsky should have brought this motion under Rule 12(f) of the Federal Rules of Civil Procedure instead of Rule 11(b). Plaintiff is mistaken. This motion is based on Plaintiff's failure to comply with its duty under Rule 11(b)(3) to conduct a reasonable independent investigation into the allegations contained in its SAC before filing it. There is no question this motion is proper under Rule 11(b). Indeed, this Court already granted Dr. Yaroshinsky's initial Motion to Strike almost all portions of the First Amended Consolidated Class Action Complaint ("FAC") under Rule 11(b) – *not* Rule 12(f). *See In re Connetics Corp. Sec's Litig.*, 542 F. Supp. 2d 996, 1005-06 (2008).

**II. PLAINTIFF’S PURPORTED INVESTIGATION IS INSUFFICIENT TO CORROBORATE THE ALLEGATIONS LIFTED FROM THE SEC COMPLAINT.**

Plaintiff’s allegations in the SAC against Dr. Yaroshinsky that are lifted from the SEC Complaint did not derive from an independent investigation and therefore are not based upon independent corroborating sources. In its Opposition, Plaintiff attempts to talk its way out of these deficiencies by making circular arguments that all lead back to one inevitable conclusion: the allegations regarding Dr. Yaroshinsky in Plaintiff’s SAC consist of nothing more than a regurgitation of the SEC Complaint.

**A. The Court Already Found That Plaintiff’s Allegations Should be Stricken Because Plaintiff Failed to Meet Its Rule 11(b)(3) Obligations.**

Since the Court granted Dr. Yaroshinsky’s previous motion to strike the allegations in the FAC that Plaintiff lifted directly from the SEC Complaint concerning Dr. Yaroshinsky, Plaintiff is now apparently attempting to make an end run around a motion for reconsideration by telling the Court its previous decision was incorrect under Rule 11(b) and conflicts with a case decided in the Southern District of New York, *de la Fuente v. DCI Telecomms., Inc.*, 259 F. Supp. 2d 250 (S.D.N.Y. 2003). *See Opp.* at 2-3, 11-12. Plaintiff’s arguments are not only improper at this stage of the proceedings, they are unavailing. First, this Court already addressed and dismissed *de la Fuente* in its January 29, 2008 order granting the previous motion to strike, noting that “[i]n *de la Fuente*, the court considered Rule 11 but specifically noted the plaintiff had stated ‘that every allegation in the complaint was verified by plaintiff’s counsel through independent investigation.’” *See In re Connetics*, 524 F. Supp. 2d at 1005 (“The Court is not persuaded that these cases [cited by Plaintiff, including *de la Fuente*,] support plaintiffs’ attempt to skirt the requirements of Rule 11(b)(3).”). Here, Plaintiff has not verified through independent investigation any of the allegations in the SAC that were lifted from the SEC’s Complaint concerning Dr. Yaroshinsky. The *de la Fuente* case is therefore equally inapplicable now as it was when Plaintiff cited it in its opposition to the original motion to strike.<sup>2</sup>

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<sup>2</sup> Plaintiff’s reliance on *In re Enron Corp. Sec. Litig.*, 2005 U.S. Dist. LEXIS 41240 (S.D. Tex. Dec. 22, 2005), *see Opp.* at 10, is misplaced for the same reasons. This case does not involve a

1 Second, even if a motion for sanctions under Rule 11 requires a showing that the  
 2 complaint is baseless and made without a reasonable and competent inquiry, this does not  
 3 eliminate Plaintiff's obligation under Rule 11(b)(3) when signing the SAC to have conducted a  
 4 reasonable investigation prior to filing that document. As the Court correctly stated, citing  
 5 authority from the United States Supreme Court and the Ninth Circuit, "an attorney has a  
 6 nondelegable responsibility to personally . . . validate the truth and legal reasonableness of the  
 7 papers filed, . . . , and to conduct a reasonable factual investigation." *In re Connetics*, 524 F.  
 8 Supp. 2d at 1005 (internal quotations omitted) (citations omitted). The Court, relying on this  
 9 authority, concluded that "plaintiffs did not personally investigate their claims against defendants  
 10 Yaroshinsky and Zak"; the Court therefore struck Plaintiff's allegations concerning these  
 11 Defendants under Rule 11(b). *Id.* at 1006.

12 The situation has not changed since the Court's previous order striking allegations in the  
 13 FAC pursuant to Rule 11(b). Plaintiff still relies entirely on the SEC Complaint and has lifted the  
 14 allegations concerning Dr. Yaroshinsky from the SEC Complaint. As discussed further below,  
 15 Plaintiff's arguments (i) that it can rely on the SEC's investigation, (ii) that it has Confidential  
 16 Witnesses who knew or were friends with Dr. Yaroshinsky or who happened to be on a  
 17 conference call with Dr. Yaroshinsky (without anything further), or (iii) that it relied on one  
 18 newspaper article that does nothing more than cite to the allegations SEC Complaint, do not  
 19 corroborate the allegations lifted from the SEC Complaint or evidence an independent  
 20 investigation by Plaintiff. The analysis is therefore unchanged. Plaintiff failed to satisfy its  
 21 obligations under Rule 11(b)(3), and the allegations in the SAC concerning Dr. Yaroshinsky that  
 22 were lifted from the SEC Complaint should be stricken. *See id.* at 1004-05 ("plaintiffs cite no  
 23 authority that stands for the proposition that an attorney may rely *entirely* on another complaint as  
 24 the *sole* basis for his or her allegations" and cannot "skirt the requirements of Rule 11(b)(3)")  
 25 (emphasis in original); *see also Nolte v. Capital One Fin. Corp.*, 390 F.3d 311, 317 n.\* (4th Cir.

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 28 bankruptcy examiner; it involves Plaintiff's improper attempt to avoid its obligations under Rule 11(b)(3) by relying completely on the SEC Complaint.

2004); *In re Buca Inc. Sec. Litig.*, No. 05-1762, 2006 WL 3030886, \*1 n.1 (D. Minn. Oct. 16, 2006); *Geinko v. Padda*, No. 00 C 5070, 2002 WL 276236, \*6 & n.9 (N.D. Ill. Feb. 27, 2002).<sup>3</sup>

**B. Plaintiff's Confidential Witnesses Do Not Corroborate the SEC Complaint.**

Plaintiff completely ignores the arguments in the Motion to Strike that *none* of Plaintiff's Confidential Witnesses corroborate the allegations in the SAC that Plaintiff lifted from the SEC Complaint concerning Dr. Yaroshinsky. Plaintiff merely makes the conclusory statement that "[t]he facts set forth in the SEC [C]omplaint are corroborated by former Connetics employees" and cite paragraph 43 of the SAC. Yet Plaintiff fails to address the fact that the SAC pleads nothing more than the allegation that 2 (of 12) Confidential Witnesses "knew Defendant Yaroshinsky well" or were "friends with Defendant Yaroshinsky." SAC ¶ 43(c), (d). Plaintiff also argues that the bare allegation that Confidential Witness No. 6 attended the April 13, 2006 conference call with the ECAC somehow constitutes independent corroboration of the allegations lifted from the SEC Complaint. Alleging that Confidential Witness No. 6 merely attended the call does not corroborate the very specific allegations Plaintiff copied from the SEC Complaint as to what the ECAC told Connetics during the call. *Id.* ¶ 108; Opp. at 7.

Thus, Plaintiff cannot rely on Confidential Witnesses to corroborate its allegations in the SAC that were lifted from the SEC Complaint. Moreover, as discussed below, Plaintiff has alleged no other independent investigation or corroboration sufficient to defeat this Motion to Strike.

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<sup>3</sup> Plaintiff claims that Dr. Yaroshinsky's request that the Court take judicial notice of the SEC Complaint is inconsistent with *Buca* and *Nolte* because those cases state that a court may not take judicial notice of an SEC complaint if the facts set forth in the complaint are subject to dispute. See Opp. at 14. Plaintiff misconstrues the reasoning of these cases. In fact, as Plaintiff recognizes, the courts in *Buca* and *Nolte* sought judicial notice of the SEC complaints *to prove the truth of the matters asserted therein*. See *Nolte*, 380 F.3d at 317 n.\*; *Buca*, 2006 WL 3030886, at \*1 n.1 (noting that "[a] court may take judicial notice of SEC filings . . . where the filings were required by law and were not offered to prove the truth of the documents' contents"); Opp. at 13-14. That these courts denied the requests for judicial notice under those circumstances is exactly the point: the allegations in the SEC complaints are subject to dispute and cannot be judicially noticed for the truth of those allegations. By contrast, Dr. Yaroshinsky merely requests that the Court take judicial notice of the SEC Complaint so that the Court can compare the allegations therein to the allegations in the SAC, which will reveal that Plaintiff once again lifted its allegations directly from the SEC Complaint.

1           **C.       Plaintiff's Reliance on the SEC's Investigation Is Insufficient.**

2           Plaintiff alleges in the SAC and its Opposition that Plaintiff is entitled to rely on the  
3       SEC's investigation and allegations in the SEC Complaint. SAC ¶¶ 41-48; Opp. at 10-11.  
4       Plaintiff asserts that the SEC's Complaint is a "reliable source" because of the SEC's  
5       investigation. Plaintiff made this same "reliable source" argument in its opposition to the  
6       previous motion to strike, *see In re Connetics*, 542 F. Supp. 2d at 1004, and the Court was not  
7       persuaded then. These arguments are no more persuasive now. Plaintiff's citations to the SEC's  
8       investigation underlying the SEC's allegations in the SEC Complaint do not constitute an  
9       *independent* investigation by Plaintiff under Rule 11(b). Rather, the argument is circular:  
10      Plaintiff seeks to rely on the SEC's investigation (not their own investigation) to support the  
11      allegations it lifts from the SEC Complaint. If Plaintiff's interpretation was correct, it would  
12      vitiate the requirements of Rule 11(b)(3).

13           Further, Plaintiff cannot shirk *its* duties under Rule 11(b)(3) to conduct an independent  
14      investigation by relying on the SEC's actions in fulfilling its obligations under Rule 11(b)(3). *See*  
15      *id.* at 1005 ("Under Rule 11(b), an attorney has a 'nondelgable responsibility' to 'personally . . .  
16      validate the truth and legal reasonableness of the papers filed [Citation], and 'to conduct a  
17      reasonable factual investigation'" (quoting *Pavelic & LeFlore v. Marvel Entm't Group*, 493 U.S.  
18      120, 126 (1989) and *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1127 (9th Cir. 2002)). The cases  
19      cited in the Opposition for the proposition that an attorney signing a pleading can rely on other  
20      attorneys are inapplicable here because those cases involved, for example, attorneys relying on  
21      other attorneys within their own firm (*Morris v. Wachovia Sec., Inc.*, 2007 U.S. Dist. LEXIS  
22      52675 (E.D. Va. Jul. 20, 2007)), attorneys relying on their client and their client's touted "expert"  
23      attorney (*Refac Int'l, Ltd. v. Hitachi Ltd.*, 1991 U.S. Dist. LEXIS 20733 (C.D. Cal. Dec. 23,  
24      1991)), and attorneys relying on the analysis of other attorneys where the signing attorney obtains  
25      "knowledge of facts sufficient to enable him to certify that the paper is well-grounded in fact"  
26      (*see* Opp. at 15 (citing *Unioil, Inc. v. E.F. Hutton & Co.*, 809 F.2d 548, 558 (9th Cir. 1986))).  
27      None of those cases involves the situation here, where Plaintiff has relied *entirely* on the

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1 allegations in another entity's complaint and attempt to substitute that entity's investigation as  
2 required by Rule 11 for its own investigation.

3 Similarly, Plaintiff's assertion that it can rely on hearsay, *see* Opp. at 14, misses the mark  
4 because Plaintiff has completely failed to show that it conducted its own independent  
5 investigation or that Plaintiff can corroborate any of the allegations that it lifted from the SEC  
6 Complaint concerning Dr. Yaroshinsky.

7 Plaintiff therefore cannot rely on these arguments to defeat the Motion to Strike.

8 **D. The San Francisco Chronicle Article Does Not Corroborate the Allegations**  
9 **Set Forth in the SEC Complaint Lifted by Plaintiff.**

10 Plaintiff's purported reliance on a March 28, 2006 article in the *San Francisco Chronicle*  
11 is similarly misplaced. *See* SAC ¶ 50; Opp. at 3. The cases Plaintiff cites require that the  
12 newspaper article be the result of an independent investigation by the newspaper. *See, e.g.,*  
13 *Tracinda Corp. v. DaimlerChrysler AG*, 197 F. Supp. 2d 42, (D. Del. 2002) (citing *McKesson*  
14 *HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1248 (N.D. Cal. 2000), for the proposition that "the  
15 article be the result of independent investigative efforts by those authoring or sponsoring the  
16 article"). By contrast, the *San Francisco Chronicle* article merely repeats the allegations of the  
17 SEC Complaint, even citing the SEC Complaint. Thus, the *San Francisco Chronicle* article is not  
18 based upon an independent investigation and is not an exposé, such as the articles contemplated  
19 by the cases upon which Plaintiff purports to rely. Plaintiff's reliance on the *San Francisco*  
20 *Chronicle* article is no different from its wholesale reliance on the SEC Complaint – neither  
21 constitutes an independent investigation by Plaintiff itself as required under Rule 11(b).

22 **E. The Stipulated Preliminary Injunction Does Not Corroborate the Allegations**  
23 **Set Forth in the SEC Complaint Lifted by Plaintiff.**

24 Since Plaintiff cannot show it conducted its own independent investigation to support the  
25 allegations that it lifted from the SEC Complaint, Plaintiff attempts a different tactic. Plaintiff  
26 claims that the *ex parte* temporary restraining order and subsequent *stipulated* preliminary  
27 injunction entered in the SEC action freezing certain of the assets in Dr. Yaroshinsky's brokerage  
28 accounts corroborate the allegations Plaintiff lifts from the SEC Complaint. SAC ¶ 52; Opp. at 5.

1 Not so. First, the *ex parte* temporary restraining order – which the SEC obtained without  
 2 providing notice to Mr. Yaroshinsky (who resides in California) – was entered in a New York  
 3 federal court, based on the Second Circuit standard for freezing assets (as distinguished from an  
 4 ordinary temporary restraining order). Yet Plaintiff cites the *California* standard for granting an  
 5 ordinary temporary restraining order. *See* Opp. at 5. Under Second Circuit law, “[a]n asset  
 6 freeze requires a lesser showing” than a typical preliminary injunction enjoining violations of  
 7 securities laws. *SEC v. Cavanaugh*, 155 F.3d 129, 132 (2d Cir. 1998). Second, and most  
 8 significant for purposes of this Motion to Strike, an *ex parte* temporary restraining order freezing  
 9 assets in the SEC action does not constitute an independent investigation by Plaintiff in this action  
 10 as required under Rule 11(b)(3).

11 Similarly, that Dr. Yaroshinsky *stipulated* to a preliminary injunction is not evidence of an  
 12 independent investigation by Plaintiff in this action. Nor is it an admission of any wrongdoing as  
 13 Plaintiff appears to be arguing. Dr. Yaroshinsky merely stipulated – without admitting the  
 14 veracity or correctness of the allegations in the SEC Complaint – to a more limited preliminary  
 15 injunction not to dispose of assets pending resolution of the SEC action. This stipulation does  
 16 nothing to corroborate Plaintiff’s allegations lifted from the SEC Complaint.

17 **F. Dr. Yaroshinsky’s Answer to the SEC Complaint Does Not Corroborate the**  
 18 **Allegations Set Forth in the SEC Complaint Lifted by Plaintiff.**

19 Plaintiff cites to various “admissions” by Dr. Yaroshinsky in his Answer to the SEC  
 20 Complaint as support for Plaintiff’s purported investigation behind the allegations in the SAC.  
 21 Yet Plaintiff ignores the plain fact that, as discussed in the opening brief supporting this Motion  
 22 to Strike, Dr. Yaroshinsky’s Answer to the SEC Complaint in no way admits to liability, but  
 23 rather denies liability. Plaintiff has *not* shown that Dr. Yaroshinsky’s Answer admits to insider  
 24 trading, corroborates the scienter allegations that Plaintiff lifted from the SEC Complaint, admits  
 25 the allegations in the SEC Press Release quoted in paragraph 144 of the SAC, or admits to any of  
 26 the allegations set forth in the SAC’s claim for violation of Section 10(b)/Rule 10b-5 that Plaintiff  
 27 lifted from the SEC Complaint. Rather, Plaintiff completely ignores the fact that not only does

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1 Dr. Yaroshinsky's Answer deny the allegations that form the elements of the claims against him,  
2 but it also raises affirmative defenses.

3 Thus, Dr. Yaroshinsky's Answer does not corroborate the SEC Complaint as to any  
4 critical allegation and, thus, cannot form a basis under Rule 11(b) for Plaintiff to rely on the  
5 allegations of the SEC Complaint.

6 **G. The Consent Decree and Zak's Settlement With the SEC Do Not Corroborate**  
7 **the Allegations Set Forth in the SEC Complaint Lifted by Plaintiff.**

8 Plaintiff does not address Dr. Yaroshinsky's argument in the opening brief in support of  
9 this Motion to Strike that Zak's decision to enter into a settlement with the SEC in which he did  
10 not admit or deny the allegations in the SEC Complaint does not corroborate the allegations in the  
11 SEC Complaint as they apply to Dr. Yaroshinsky or, for that matter, Zak. *See* SAC ¶ 55; *see also*  
12 *Fed. R. Evid. 408*. Rather, Plaintiff makes the unsupported assertion that the mere fact that Zak  
13 entered into a settlement somehow corroborates the allegations in the SAC that Plaintiff lifted  
14 from the SEC Complaint. Zak has admitted no wrongdoing, so his settlement certainly cannot  
15 corroborate the allegations Plaintiff lifted from the SEC Complaint with respect to Yaroshinsky  
16 (or Zak). Furthermore, the settlement is inadmissible to prove liability and therefore does not  
17 corroborate the allegations Plaintiff lifted from the SEC Complaint. *Fed. R. Evid. 408*.

18 For the same reasons, the consent decree that Yaroshinsky voluntarily entered into with  
19 the SEC does not corroborate the allegations in the SAC because Yaroshinsky did not admit to  
20 any wrongdoing, and is not admissible to prove liability. *See Fed. R. Evid. 408*.

21 Thus, these arguments are also inadequate to defeat this Motion to Strike because Plaintiff  
22 has failed to fulfill its obligations under Rule 11(b)(3).

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1 **III. CONCLUSION.**

2 For the reasons set forth above and in the opening brief, Dr. Yaroshinsky respectfully  
3 requests that the Court grant this Motion to Strike.

4 Dated: July 18, 2008

DLA PIPER US LLP

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7 By /s/ Gerard A. Trippitelli  
SHIRLI FABBRI WEISS  
8 GERARD A. TRIPPITELLI  
JULIE L. SCHWARTZ  
9 ALYSSON RUSSELL SNOW  
Attorneys for Defendant ALEXANDER  
10 YAROSHINSKY

11 WEST\21472219.2  
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